

Respondent presented two witnesses who provided evidence inconsistent with claimant's testimony. One of claimant's co-workers, Karri Bannon, testified that claimant told her the morning of the alleged accident that she (claimant) had injured her back over the weekend moving some rocks. Another co-worker, Carolyn Gudvardarson, testified she

had talked to claimant the morning of July 5 and claimant mentioned that her back was bothering her as a result of landscaping activities she performed over the July 4th weekend.

Claimant argues that even if her back was hurting her when she came to work that morning, that does not mean she did not suffer a new injury or aggravate the existing injury when lifting the boat with Karri Bannon as alleged. But claimant was not forthcoming about her back being injured at home until confronted by the co-workers' testimony. Karri Bannon testified that she does not recall lifting a boat with claimant and did not see claimant lifting a boat that morning. Ms. Gudvardarson likewise testified that she did not observe claimant lift a boat that morning, but conceded claimant was not always within her view. Furthermore, Ms. Gudvardarson said claimant also told her that she (claimant) was going to say she had hurt her back at work lifting a boat.

The Administrative Law Judge had the opportunity to observe claimant and the two co-workers testify. The ALJ apparently did not believe claimant's version of events because he denied benefits. The Appeals Board generally gives some deference to the ALJ's evaluation of credibility for witnesses who have testified live before the ALJ. The Board's review of the record suggests it is reasonable to rely on the ALJ's determination of credibility in this case and in doing so the Board concludes the Order should be affirmed.

Claimant argues that respondent and its insurance carrier improperly failed to produce the statements of the two co-workers taken by one of their supervisors, Clyde Ramey, despite claimant's request for discovery and an initial agreement by respondent's insurance carrier to produce the statements in exchange for a medical authorization, which claimant provided. Although the ALJ's failure to rule on the motion to compel discovery was not raised as an issue in this appeal, claimant asks the Board to note claimant's "concern" with the manner in which her discovery request was handled. The Board shares claimant's concern about the respondent's claim of privilege and the ALJ's failure to compel production.¹ But the Board also notes that claimant may have waived her objection to the failure to permit discovery by proceeding to preliminary hearing and taking testimony without first obtaining a ruling on the motion and then failing to object when respondent called Carolyn Gudvardarson and Karri Bannon to testify.² Under these circumstances, any likelihood of having the co-workers' testimony stricken from the record on appeal was greatly diminished. Absent this remedy the issue became moot once the statements were finally produced during the preliminary hearing.

¹ Respondent and its insurance carrier refused to produce the written statements of the claimant's co-workers on the grounds of attorney client privilege and work product. In its brief to the Board, however, respondent and its insurance carrier admit that these statements were obtained by respondent in the normal course of business as a result of respondent initiating "its usual accident investigations."

² Claimant's counsel objected when respondent offered Ms. Gudvardarson's written statement as an exhibit at the conclusion of her direct testimony. Claimant's counsel did not object when respondent offered the written statement taken from Karri Bannon.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on August 17, 2000, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Matthew J. Thiesing, Lenexa, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director